NO. 47740-8-II
NO. 47742-4-II (consolidated)
NO. 47743-2-II (consolidated)
NO. 47745-9-II (consolidated)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON SHIRTS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Jennifer Snider, Commissioner
The Honorable Daniel L. Stahnke, Judge

BRIEF OF PETITIONER

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A. ASSIGNMENT OF ERROR

The trial court erred by failing to consider whether Shirts's payment of legal financial obligations (LFOs) will impose manifest hardship on him or on his immediate family, as RCW 10.01.160(4) requires.

Issues Pertaining to Assignment of Error

1. When the pertinent statute directs the trial court to consider whether it appears to its satisfaction that payment of the amount due in LFOs will impose manifest hardship on the defendant or the defendant's immediate family, does the trial court err when it fails consider whether LFOs impose manifest hardship?

2. Is Shirts aggrieved by the trial court's complete failure to consider whether outstanding LFOs impose manifest hardship?

3. What superior court procedures or standards should be established to ensure LFOs are remitted when they impose manifest hardship?

B. STATEMENT OF THE CASE

1. Shirts's motions for remission of LFOs

Shirts signed and dated four motions to waive or forgive his LFOs on April 13, 2015, one for each of the Clark County Superior Court causes

under which he was sentenced. Appendix[1] (App.) 54, 138, 228, 307. Along with the motions, Shirts also filed affidavits in support of the motions to waive or forgive the LFOs, motions for counsel at public expense, motions to pull fines out of collections, affidavits in support of the motions to pull fines out of collections, proposed findings of indigency and proposed orders of indigency, motions for findings of indigency, affidavits of indigency, motions to docket the matter on May 1, 2015, and declarations of service. App. 55-70, 139-54, 229-44, 308-23. Although Shirts noted the motions for May 1, 2015, his documents were not received and filed by the superior court until May 6, 2015. App. 55, 57-60, 64, 67-70, 138-39, 141-44, 148, 151-54, 228-29, 231-34, 238, 241-44, 307-08, 310-13, 317, 320-23 (showing filing date of May 6, 2015).

In these pleadings and affidavits, Shirts asserted that when the trial court imposed the LFOs, it did not consider whether Shirts had any ability to pay them. App. 54-55, 58-59, 61, 138-39, 142-43, 145, 228-29, 232-33, 235, 307-08, 311-12, 314. Indeed, the trial court did not consider Shirts's ability to pay any amount in LFOs at sentencing. See 1RP[2] 12 (concluding without ability-to-pay analysis "that the legal financial obligations as set out are

[1] By agreement of the parties and approval by the court, the briefing cites the documentary record by referring to the Sharpie®-marked pages in the appendix to Shirts's motion for discretionary review.

[2] This brief refers to the sentencing transcripts as follows: 1RP—May 15, 2002; 2RP—September 20, 2006; 3RP—February 1, 2008; 4RP—December 14, 2012.

reasonable"); 2RP 6, 8 (trial court explaining that it will impose LFOs as provided in prosecutor's sentencing recommendation without ability-to-pay determination); 3RP 5 (trial court asking Shirts how he will pay LFOs, Shirts answering that he was working as a roofer prior to sentencing, and trial court responding, "Good. You can make monthly payments then," without any further determination of his wage or actual ability to pay); 4RP 1-9 (no discussion of LFOs whatsoever).

In the motions and affidavits in support of remission, Shirts also stated, "Mr. Jason Shirts has been incarcerated since 2012 in the department of corrections, his circumstances have changed drastically and these fines are causing a sever[e] hardship on him and his family." App. 54-55, 138-39, 228-29, 307-08. Shirts also indicated that "these fines are causing me to be denied transitional classes, and classification advances [in the DOC], I am humbly asking the court for relief." App. 54-55, 138-39, 228-29, 307-08. Shirts swore to the truth of these allegations under penalty of perjury. App. 56, 66, 140, 150, 230, 240, 309, 319.

In Shirts's motions requesting counsel, Shirts noted he was "poor, incarcerated, and sever[e]ly handicapped . . . . I am 125% below the poverty level and I need assistance in the difficult legal process in this court." App. 57, 141, 231, 310. In his motions and affidavits to pull fines out of collections, Shirts also stated that, in addition to not considering his ability to

pay the LFOs themselves, no court considered his ability to pay "the interest that has been pil[]ing up." App. 58-59, 142-43, 232-33, 311-12.

In motions for findings of indigency and affidavits for indigency, Shirts requested, among other things, preparation of verbatim reports of proceedings as necessary for review. App. 60, 64, 144, 148, 234, 238, 313, 317. Shirts also indicated he had no salary or wages, had no checking or savings account, had no property of value, was not married, and owed $100,000 to creditor AllianceOne in Gig Harbor. App. 65-66, 149-50, 239-40, 318-19.

The State issued a brief response on May 7, 2015, asserting, "The defendant may bring a motion to terminate legal financial obligations only after the State makes attempts to collect the obligation." App. 71, 155, 245, 324. Although Shirts never alleged the DOC was collecting money that is applied to the legal financial obligations, the State nonetheless noted, "In those cases in which the Department of Corrections is recovering money that is applied to the legal financial obligations, the defendant's [sic] do not have a cause of action pursuant to RCW 10.01.150." App. 71, 155, 245, 324.

On May 21, 2015, without the presence of Shirts or any defense attorney, the trial court found "that the Defendant has failed to allege or provide evidence that Clark County is attempting or seeking enforcement/

collection of Legal Financial Obligations at this time" and denied Shirts's motion to terminate LFOs. App. 73, 157, 247, 326.

Also on May 21, 2015, Shirts filed a motion for a telephonic appearance and hearing or an order of transport to enable him to participate in a hearing. App. 74-75, 77-78, 158-59, 161-62, 248-49, 251-52, 328-33. Shirts had signed this motion on May 17, 2015 and mailed it. App. 75, 78, 159, 162, 249, 252, 329. Shirts explained he had been moved between DOC institutions and thus was unable to arrange for a telephonic hearing on May 21, 2015. App. 74, 77, 158, 161, 248, 251, 330, 332. Shirts requested another court date to present oral argument and provided the contact information for DOC's legal liaison. App. 74-75, 77-78, 158-59, 161-62, 248-49, 251-52, 332-33. Despite Shirts's clear requests for telephonic hearings, Judge Stahnke wrote Shirts a letter stating, "I have reviewed your motion for 'telephonic appearance or transfer in DOC'. I have no idea what you're requesting from this court." App. 81.

On June 23, 2015, Shirts filed notices of appeal in each of the four cause numbers. App. 82-84, 163-66, 253-56, 334-36. Shirts also filed affidavits in support of notices of appeal and motions and orders for indigency. App. 85-90, 167-71, 257-61, 267, 337-40. Shirts specifically requested "[r]eproduction of the transcript of sentencing in this action" for each case. App. 89, 171, 261, 340.

The trial court authorized Shirts to seek review at public expense, but did not authorize the reproduction of sentencing transcripts that Shirts requested. App. 95-97, 175-77, 268-70, 344-46.

The State moved to strike the notice of appeal in each case on July 24, 2015. App. 98-100, 178-80, 271-73, 347-49. The State asserted "Shirts has not shown that the State has sought to collect on his LFOs," and therefore Shirts is not entitled to a hearing. App. 99, 179, 272, 348. The State also asserted that Shirts's allegations of hardship with regard to being deprived of DOC education opportunities is not sufficient for a hearing because Shirts provided no documentary support. App. 99, 179, 272, 348. Finally, the State also faulted Shirts for not providing transcripts of his sentencing hearing and asserted the case was not reviewable because Shirts had not made a sufficient record. App. 100 n.1, 180 n.1, 273 n.1, 349 n.1. This court ordered the notices of appeal to be treated as notices for discretionary review on July 31, 2015. App. 350-51.

2. Factual background regarding each of the four superior court actions

To provide context regarding the extent of the LFOs imposed on Shirts, Shirts provides brief summaries of each of the Clark County Superior Court matters, the LFOs imposed, and the trial court's collections process.

a. 2002 conviction under cause number 02-1-00245-5

On January 31, 2002, the State charged Shirts with first degree reckless burning and fourth degree assault. App. 2. Counsel was appointed to represent him due to indigency. App. 1. Shirts pleaded guilty to the reckless burning charge in exchange for the State's dismissal of the fourth degree assault charge. App. 3-8.

As part of the judgment and sentence, the court imposed a $110 criminal filing fee, a $500 victim assessment, a $595 fee for Shirts's court-appointed attorney, and a $500 fine. App. 11. The trial court later ordered $7,837.33 in restitution to Farmers Insurance. App. 22.

Following Shirts's incarceration and community custody term, DOC filed a report closing its supervision on January 3, 2005. App. 24-28. The DOC's closure report indicated Shirts owed $11,901.18 in LFOs, which included $2,358.85 in interest. App. 25.

Clark County Superior Court Collections Unit issued a citation requiring Shirts to appear on April 21, 2005 for a payment review hearing. App. 29. When Shirts did not appear, the prosecutor requested Shirts be arrested and a bench warrant issued. App. 31-36. The prosecutor's documentation indicated $2,738.20 in interest had accrued and Shirts now owed $12,380.53 in LFOs. App. 35

At another payment review hearing on September 27, 2005, the trial court jailed Shirts for 30 days due to his failure to pay, permitting Shirts's release only if he paid $200 toward his LFOs. App. 37-40. No attorney was appointed to assist him. App. 37-38, 40.

The superior court authorized another warrant for failure to appear and pay on February 16, 2006 and March 6, 2008. App. 41-42. Although prosecutors were present at the payment review hearings, no attorney represented Shirts. App. 41-42.

On June 27, 2008, the prosecutor again moved to modify Shirts's judgment and sentence to impose incarceration for failure to pay LFOs. App. 43-46. According to the prosecutor's documentation, Shirts owed a total of $16,064.52, which included the accrual of $200 in collection fines and $6,367.19 in interest. App. 46.

The prosecutor again sought to jail Shirts on March 19, 2012 for not paying LFOs. App. 47-48. At that time, Shirts's unpaid LFO balance was $20,746.69.[3] App. 48. Shirts was arrested and screened for appointed counsel on April 6, 2012. App. 49-51. The screening paperwork indicated Shirts received $200 in food stamps, had a monthly income of $250, and was paying $130 per month for child support. App. 51. Nonetheless, at the

[3] This is the most up-to-date figure in the court file for the 2002 case.

prosecutor's request, Shirts was ordered to serve 10 days in jail for LFO nonpayment. App. 52-53.

b. 2006 conviction under cause number 06-1-01644-1

On April 30, 2006, the State charged Shirts with first and second degree possession of stolen property and possession of a controlled substance. App. 104-05. Shirts was indigent and qualified for court-appointed counsel. App. 101-03. Shirts pleaded guilty to the controlled substance charge. App. 106-16. In the judgment and sentence, the trial court imposed 30 days of incarceration and a $500 victim assessment, a $200 filing fee, $700 for court-appointed counsel, a $500 fine, a $1,000 drug fund charge, a $100 crime lab fee, and a $100 collection fee. App. 119-20.

In its closure report filed November 26, 2008, DOC stated this $3,100 had accrued $755.46 in interest, which totaled $3,855.46 in unpaid LFOs. App. 133.

On September 22, 2011, a payment review hearing was scheduled, but no notice of the hearing appears in the court file. App. 137. When Shirts did not appear, the trial court authorized a bench warrant. App. 137. Again, the prosecutor appeared but there was no attorney to assist Shirts. App. 137.

c. 2007 conviction under cause number 07-1-02248-1

On December 18, 2007, the State charged Shirts with arson in the first degree. App. 181. Shirts qualified for a public defender. App. 182-84.

The State amended its charge to second degree arson. App. 185. Shirts pleaded guilty. App. 186-96. The trial court sentenced Shirts to 13 months of incarceration and imposed a $500 victim assessment, a $200 filing fee, a $1,500 fee for court-appointed counsel, a $500 fine, and $100 DNA collection fee. App. 201-03. The trial court later imposed an additional $30 to reimburse defense costs. App. 214-17.

In its closure report filed March 30, 2011, DOC stated the $2,800 of LFOs had accrued $1,033.97 in interest, which totaled $3,833.97. App. 219. The DOC report also stated Shirts was homeless. App. 218.

d. 2012 convictions under cause number 12-1-01206-7

On July 9, 2012, the State charged Shirts with first degree murder, first degree assault, malicious harassment, and first degree unlawful possession of a firearm. App. 274-75. Shirts qualified for court-appointed counsel. App. 352-54. Shirts pleaded guilty to second degree assault, malicious harassment, and first degree unlawful possession of a firearm. App. 276-89. The trial court sentenced Shirts to 74 months of confinement and imposed a $500 victim assessment, a $200 filing fee, $2,250 for court-appointed counsel, a $500 fine, and a $100 DNA collection fee. App. 296-98.

Based on the court files currently available to counsel, when Shirts was last sentenced (on his 2012 convictions), he owed $31,986.12 in LFOs.

At 12 percent interest, at the end of 2013, he owed $35,824.45. With the same compounding interest rate, Shirts owed $40,123.38 in 2014 and will owe $44,938.19 at the end of 2015.

3. Discretionary review

This court granted discretionary review, consolidated Shirts's appeals, and accelerated review. See Ruling Granting Review (Oct. 26, 2015). Because the trial court did not make the required manifest hardship determination under RCW 10.01.160(4), this court concluded the trial court committed obvious and probable error that rendered further proceedings useless, substantially altered the status quo, or substantially limited Shirts's freedom to act under RAP 2.3(b)(1) and (2). Ruling Granting Review at 4-8. Pursuant to RAP 2.3(e), the court also granted review "to clarify the proper procedure for superior courts hearing [remission] motions" and "whether Shirts is an aggrieved party with standing to appeal." Ruling Granting Review at 9, 12.

D. ARGUMENT

1. RCW 10.01.160(4) EXPLICITLY PERMITS SHIRTS TO MOVE FOR REMISSION OF LFOs AT ANY TIME FOR MANIFEST HARDSHIP. AND THE FAILURE TO HOLD A FACT HEARING ON WHETHER THERE IS MANIFEST HARDSHIP WOULD RENDER RCW 10.01.160(4)'S REMISSIONS PROCESS A NULLITY AND VIOLATE DUE PROCESS

RCW 10.01.160(4) provides the LFO remission procedure in Washington:

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.[4]

This statute's meaning is clear: if LFOs are imposed on a defendant, that defendant "may at any time petition the sentencing court for remission." RCW 10.01.160(4) (emphasis added).

Shirts moved for remission of LFOs imposed in four different Clark County Superior Court matters on May 6, 2015. App. 54, 138, 228, 307. May 6, 2015 falls within the statutory timeframe, "at any time."

Because defendants may move for remission at any time, it follows that they must be given some process on the subject of remission when they

[4] RCW 10.01.170 allows the court to set a time period or specify installments for LFO payments.

so move. The second sentence of RCW 10.01.160(4) reads, "If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs . . . ." Without some fact finding process, no court could satisfy itself that payment will or will not impose a manifest hardship. That is, no manifest hardship determination can be made unless and until the moving party is able to present evidence and arguments to the trial court demonstrating why the LFOs cause manifest hardship. A commonsense reading of RCW 10.01.160(4) requires a hearing on the issue of manifest hardship.

Washington courts interpreting the remissions statute have recognized that the actual merits of a remission petition must be considered. In State v. Smits, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), Division One rejected the appealability of an order denying a RCW 10.01.160(4) remission motion because, in its view, orders denying remission are neither final judgments nor amendments to judgments under RAP 2.2(a)(1) or (9). This was so, according to the court, because the plain language of the statute makes the "amount imposed [in LFOs] . . . always subject to modification." Smits, 152 Wn. App. at 524. The court explained,

> A decision to grant or deny a motion to remit LFOs is a determination of whether the defendant should be required to pay based on the conditions as they exist when the request is

> made. It does not alter or amend the judgment but rather changes the requirement of payment based on a present showing that payment would impose manifest hardship.

Id. (emphasis added) (footnote omitted). Smits supports the conclusion that trial courts must actually consider the issue of manifest hardship based on the defendant's present circumstances. Indeed, that is precisely what the trial court did in Smits: "The court held a hearing and entered separate orders denying the 'Defendant's Motion to terminate Legal Financial Obligations.'" Id. at 518 (emphasis added). Shirts, like Smits, needs a factual hearing on his motions to remit LFOs based on the consideration of his current circumstances.

This court has also indicated that consideration of presently available facts is especially warranted in indigent cases. As the ruling granting review pointed out, in State v. Campbell, 84 Wn. App. 596, 600, 929 P.2d 1175 (1997), this court stated, "additional fact finding from the bench is probably warranted in low income cases like this." See Ruling Granting Review at 6-7 & n.3. The Campbell court, somewhat incredulous toward the trial court for determining Campbell could pay LFOs, stated, "Although it is difficult to comprehend how a person supporting himself and a child on $700 per month would have *any* disposable income, Campbell indicated that he did, so we uphold the trial court's finding." Campbell, 84 Wn. App. at 600. Therefore, "under these facts," "the trial court did not abuse its discretion by denying"

Campbell's motion. Id. at 600-01. Campbell's marked reservations in the context of low income cases, however, call for enhanced judicial scrutiny of an indigent person's actual, present ability to pay LFOs when the indigent person moves for remission based on manifest hardship.

Moreover, an adequate remissions process—one where a defendant's financial circumstances are actually considered—is necessary to the constitutionality of the LFO system as a whole. In Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), the United States Supreme Court rejected Fuller's equal protection challenge because Oregon's statute, like Washington's, provided a remissions process. "The convicted person from whom recoupment is sought thus retains all the exemptions accorded to other judgment debtors, in addition to the opportunity to show at any time that recovery of the costs his legal defense will impose 'manifest hardship[.]'" Id. at 47 (emphasis added). Thus, the Court concluded "legislation before us . . . is wholly free of the kind of discrimination" that violates the equal protection clause. Id. at 47-48. Other federal courts have interpreted Fuller as requiring examination of a defendant's financial circumstances whenever the issue of hardship arises. See Alexander v. Johnson, 742 F.2d 117, 124 (4th Cir. 1984) (holding that, under Fuller, courts must give a defendant notice and opportunity to be heard on the issue of repayment of counsel fees and "the entity deciding whether to

require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required"); Olson v. James, 603 F.2d 150, 155 (10th Cir. 1979) (gleaning Fuller's constitutional requirements to mean that a person against whom LFOs were imposed "ought at any time to be able to petition the sentencing court for remission of the payment of costs or any unpaid portion thereof. The court should have the power to issue remittitur if payment will impose manifest hardship on the defendant or his immediate family").

Washington courts have also recognized that a robust remissions process is constitutionally required. This recognition began in State v. Barklind, 87 Wn.2d 814, 817, 577 P.2d 314 (1977), where the Washington Supreme Court recited what is constitutionally required under Fuller:

> [A] convicted person under obligation to repay may petition the court for remission of the payment of costs or of any unpaid portion thereof. The trial court order specifically allows the defendant to petition the court to adjust the amount of any installment or the total amount due to fit his changing financial situation.

Likewise, in State v. Curry, 118 Wn.2d 911, 915, 829 P.2d 166 (1992), the court listed one of the seven requirements that "must be met" for Washington's LFO scheme to be constitutional: "The convicted person must be permitted to petition the court for remission of the payment of costs or

any unpaid portion." RCW 10.01.160 was constitutional, in part, because the "court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified." Curry, 118 Wn.2d at 916.

In State v. Blank, 131 Wn.2d 230, 244, 930 P.2d 1213 (1997), the Washington Supreme Court upheld the constitutionality of the appellate cost scheme under RCW 10.73.160, because it "allows for a defendant to petition for remission at any time." The court noted that an obligation to pay "without opportunity for a hearing in which the defendant may dispute the amount assessed or the ability to repay, and which lacks any procedure to request a court for remission of payment violates due process." Blank, 131 Wn.2d at 244. More recently, this court in Utter v. Dep't of Soc. & Health Servs., 140 Wn. App. 293, 303-04, 165 P.3d 399 (2007), "delineated the salient features of a constitutionally permissible costs and fees structure" to include a requirement that the "convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion . . . ."

The constitutional lesson of all these cases and the plain language of RCW 10.01.160(4) is that defendants must be given a fair hearing of the subject of their LFO remission motions so that trial courts can make a manifest hardship determination based on the facts. A statute allowing a

party to move for a remission at any time based on manifest hardship while at the same time disallowing that party to present evidence and arguments germane to the manifest hardship determination makes no sense. Indeed, such a cramped reading, as the trial court and the State would give here, renders RCW 10.01.160(4) a dead letter and thereby impermissibly undercuts the constitutionality of Washington's LFO scheme overall.

Here, Shirts advanced several reasons demonstrating the LFOs cause him manifest hardship. He alleged his "circumstances have changed drastically and these fines are causing sever[e] hardship on him and his family." App. 54-55, 138-39, 228-29, 307-08. He stated that the "fines are causing me to be denied transitional classes and classification advances" where incarcerated by the Department of Corrections. App. 54-55, 138-39, 228-29, 307-08. Shirts also stated he was "poor, incarcerated, and sever[e]ly handicapped," was "125% below the poverty level." and "nee[ed] the assistance in the difficult legal process of this court." App. 57, 141, 231, 310. He cited interest "pil[]ing up" as a significant hardship. App. 58-59, 142-43, 232-33, 311-12. He stated he owed other debt in the amount of $100,000. App. 66, 150, 240, 219. His indigency documents showed he owed child support and qualified for needs-based assistance programs. App. 103, 354. DOC reported Shirts homeless in 2011. App. 218. Shirts correctly claimed that no court considered his ability to pay discretionary

LFOs before imposing them. App. 54-55, 58-59, 61, 138-39, 142-43, 145, 228-29, 232-33, 235, 307-08, 311-12, 314; 1RP 12; 2RP 6, 8; 3RP 5; 4RP 1-9. Based on his contentions, as a matter of constitutional and statutory law, Shirts was entitled to a hearing at which the trial court actually considered whether the more than $40,000 owed in LFOs caused a manifest hardship to Shirts and to his family.

Nevertheless, the trial court denied Shirts any hearing or opportunity to present evidence of manifest hardship. App. 73, 157, 247, 326. The trial court made no manifest hardship determination. App. 73, 157, 247, 326. The trial court afforded Shirts no process whatsoever. By refusing to consider Shirts's motions for remission, the trial court failed to comply with the plain commands of RCW 10.01.160(4) and thereby failed to provide the minimum process due under the constitution. This court must reverse and give Shirts a fair hearing.

2. SHIRTS IS AGGRIEVED BY THE COMPLETE DENIAL OF ANY CONSIDERATION OF HIS LFO REMISSION MOTIONS ON THEIR MERITS

RAP 3.1 provides, "Only an aggrieved party may seek review by the appellate court." "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." In re Guardianship of Lasky, 54 Wn. App. 841, 848, 776 P.2d 695 (1989). To be aggrieved, a party must have a present and substantial interest, rather than a mere expectancy or

contingent interest in the subject matter. State v. Mahone, 98 Wn. App. 342, 347, 989 P.2d 583 (1999). The complete denial of any process to Shirts regarding his remission motions qualifies him as an aggrieved party.

As a preliminary matter, while the motion for discretionary review was pending, the State argued that Smits and Mahone supported its position that Shirts was not aggrieved by the denial of his remission motion. Resp. to MDR at 2-3. As discussed above, Smits was given the precise remedy Shirts is asking for—a full evidentiary hearing on his remission motion. Smits, 152 Wn. App. at 518 ("The court held a hearing and entered separate orders denying" LFO termination motions). Though the trial court ultimately disagreed with Smits that LFOs caused a manifest hardship, it made this determination by holding a hearing and assessing the actual evidence before it. Smits supports Shirts's claim that he is aggrieved by the trial court's failure to hold any semblance of a hearing on the issue of manifest hardship.

Similarly, in Mahone, "the [trial] court determined that Mahone did not show how payment would constitute a manifest hardship." 98 Wn. App. at 346. This demonstrates that the trial court in Mahone actually considered whether the imposed LFOs would cause manifest hardship and determined they would not. Mahone therefore also supports Shirts's claim that the trial court must consider motions for remission on their merits. Under both

Mahone and Smits, Shirts has a present interest in obtaining a manifest hardship determination and is therefore aggrieved.

Moreover, in Smits, the court acknowledged, "The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay." 152 Wn. App. at 523 (emphasis added). Indeed, as a matter of common sense, "the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs." State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). The discretionary LFOs imposed on Shirts, however, were not predicated on any determination of his ability to pay them. To date, no court has ever considered whether Shirts is able to pay any amount in LFOs. Because the trial court failed to adhere to its initial obligation to consider Shirts's ability to pay before imposing LFOs, Shirts is especially aggrieved by the trial court's refusal to determine whether these LFOs cause him manifest hardship.

The trial court refused to consider Shirts's motions because "the Defendant has failed to allege or provide evidence that Clark County is attempting or seeking enforcement/ collection of Legal Financial Obligations at this time." App. 73, 157, 247, 326. This time-of-enforcement rule, cited in Smits and Mahone, reasons that the courts need do nothing about the

enormous sums imposed on indigent defendants until the State actually seeks to collect. The Mahone court, for instance, stated,

> Before Mahone is aggrieved . . . two things must happen. It must be determined that he has the ability to pay and the State must proceed to enforce the judgment for costs. Until such time as the State determines he has the ability to pay and enforces payment of the costs assessed against him, any attempt to determine whether payment will create a hardship is mere speculation.

98 Wn. App. at 348. The Smits court essentially recited Mahone's RAP 3.1 reasoning to conclude that Smits would not be aggrieved until the State sought to enforce collection. 152 Wn. App. at 525. Other cases also hold that challenges to LFOs are not ripe for review until the State attempts to collect the money. See State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013) (collecting cases); State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008) ("Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs.").

The time-of-enforcement rationale is no longer sustainable under Blazina. The same reasoning could easily have disposed of Blazina's and Paige-Colter's claims in Blazina, but the Washington Supreme Court rejected it. In Blazina, the State "argue[d] that the issue is not ripe for review because the proper time to challenge the imposition of an LFO arises when

the State seeks to collect." 182 Wn.2d at 832 n.1. The Blazina court disagreed. Id. Because the Blazina court reached the merits of the LFO issue despite no attempt by the State to collect LFOs, this court should do the same. Although Shirts is in a different procedural position because he challenges uncollected costs through the remissions process, he finds himself owing uncollected costs just like Blazina and Paige-Colter, and should receive the same consideration they did.

Another huge problem with the time-of-enforcement rationale is that it fails to account for the compounding accrual of interest. "LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time." Blazina, 182 Wn.2d at 836 (citing RCW 10.82.090(1); Travis Sterns, Legal Financial Obligations: Fulfilling the Promise of *Gideon* by Reducing the Burden, 11 SEATTLE J. SOC. JUST. 963, 967 (2013)). "[O]n average, a person who pays $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed. Id. (citing KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, The Assessment and Consequences of Legal Financial Obligations in Washington State 22 (2008)). "The inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are

released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37.

> The court's long-term involvement in defendants' lives inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. This active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism.

Id. at 837 (citations omitted); see also Alexes Harris, et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 AM. J. SOC. 1753, 1776-77 (2010) (explaining "those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later"). By recognizing that the accumulation of interest causes indigent defendants serious hardship, the Blazina court has abrogated the time-of-enforcement rationale. Shirts should not have to wait until he owes tens of thousands of dollars more due to a compounding 12 percent interest rate before the courts consider him an aggrieved party.

Even under the time-of-enforcement rationale, however, Shirts has shown that his unpaid LFOs aggrieve him. If past experience is any indication, Shirts will exit prison and immediately be required to begin paying LFOs to the Clark County Superior Court Collections Unit. E.g., App. 29, 31-48, 52-53, 137. At these payment review hearings, Shirts has

been forced to make payments on pain of imprisonment without the assistance of counsel. The trial court has also found Shirts indigent and qualified for appointed counsel, yet has also jailed him for his nonpayment of LFOs. App. 37-40, 52-53. Without a fair remission process to address the hardship LFOs have caused and continue to cause him, Shirts will merely be placed again on the superior court collections calendar and be forced to pay LFOs despite hardship, or else face additional imprisonment. If the more than $40,000 Shirts currently owes is not addressed through a remission hearing now, there is no reason to believe the superior court will adequately assess whether the LFOs cause manifest hardship when Shirts exits prison. Shirts has demonstrated he is aggrieved.

Finally, Shirts is aggrieved by DOC's disparate treatment of him for his outstanding criminal debt. As a result of outstanding LFOs, Shirts alleged DOC classifies him differently and denies him the opportunity to participate in programming that would assist him with reentry.[5] App. 54-55, 138-39, 228-29, 307-08. The denial of such reentry programming aggrieves Shirts because it will cause him even more difficulty ever being able to pay any amount toward LFOs when he exits prison. In addition to the mere monetary hardship that aggrieves him, Shirts has demonstrates he is

[5] At oral argument before Commissioner Bearse, the State suggested that Shirts's DOC classification claim was either incorrect or disingenuous. The State's dispute of Shirts's averments, however, merely presents yet another reason to require a fact finding hearing on the issue of manifest hardship.

aggrieved by the DOC's denial of reentry programming and opportunities. This court should conclude that Shirts is presently aggrieved.

3. THE EVIDENTIARY HEARING MUST EMPLOY SOME STANDARD TO MEANINGFULLY ASSESS WHETHER LFOs IMPOSE A "MANIFEST HARDSHIP," AND CONSISTENT WITH *BLAZINA*, GR 34 PROVIDES AN APPROPRIATE STANDARD

When faced with motions for remission, trial courts must determine whether "it appears to the[ir] satisfaction . . . that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family," and, if so, decide whether to "remit all or part of the amount due in costs." RCW 10.01.160(4). This is a gooey and amorphous standard—nowhere in Title 10 RCW is there a definition of "manifest hardship." Nor does the case law interpreting RCW 10.01.160(4) say what "manifest hardship" means. In order to provide needed guidance, this court should instruct trial courts on how to assess manifest hardship when reviewing indigent parties' motions to remit LFOs.

Blazina provides helpful direction on how best to do so. The Blazina court stressed the need for an "individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." 182 Wn.2d at 838. To assist the courts in making this determination, Blazina

instructed that "[c]ourts should also look to the comment in court rule GR 34 for guidance." 182 Wn.2d at 838.

> This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a need-based, means-tested assistance program, such as Social Security or food stamps. In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Id. at 838-39 (emphasis added) (citations omitted).

Under GR 34, a person is considered indigent when he or she receives assistance through a governmental needs-based, means-tested program such as TANF, Supplemental Security Income, poverty-related veteran's benefits, state-provided general assistance for unemployable individuals, or food stamps. GR 34(a)(3)(A). Indigency is presumed when a person's household income is below 125 percent of the federal poverty guideline or when a person, despite being above the 125-percent threshold, has recurring living expenses that render him or her unable to pay fees and surcharges. GR 34(a)(3)(B)–(C). Courts may also determine a person is indigent based on "other compelling circumstances" "that demonstrate an applicant's inability to pay fees and/or surcharges." GR 34(a)(3)(D).

In addition, the Washington Supreme Court promulgated GR 34 based on "the constitutional premise that every level of court has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. The goal is to "ensure[] that meaningful access to judicial review is available to the poor as well as to those who can afford to pay." Id. GR 34 is particularly useful because it provides needed uniformity when it comes to determining ability to pay. See Jafar v. Webb, 177 Wn.2d 520, 523, 303 P.3d 1042 (2013) ("GR 34 provides a uniform standard for determining whether an individual is indigent and further requires the court to waive all fees and costs for individuals who meet this standard.").

Although the Blazina court proposed GR 34 as an appropriate standard to assess whether to impose LFOs at sentencing, there is no reason it is not also an appropriate standard to assess whether the payment of the outstanding balance of already assessed LFOs present a manifest hardship under RCW 10.01.160(4). If courts should "seriously question" a person's ability to pay LFOs if he or she meets the GR 34 standard, why should they not also "seriously question" whether continuing to carry an outstanding criminal debt causes manifest hardship?

GR 34, in the remissions context, would best be employed as a rebuttable presumption, much like the Blazina court suggested. If a person meets the GR 34 indigency standard, courts should presume "that payment

of the amount due will impose manifest hardship on the defendant or the defendant's immediate family." RCW 10.01.160(4). Then the State may attempt to rebut this presumption by presenting evidence that the payment of the outstanding balance of LFOs will not impose a manifest hardship because of the person's current or likely future ability to pay. Employing the GR 34 standard in this manner would allow trial courts to make meaningful manifest hardship assessments under the remission statute. This court should use this case as a vehicle to adopt GR 34 as a meaningful standard and procedure for assessing manifest hardship under RCW 10.01.160(4).

4. BECAUSE THERE IS NO STANDARD OR PROCEDURE TO ASSESS MANIFEST HARDSHIP UNDER THE REMISSION STATUTE, COUNSEL SHOULD BE APPOINTED TO ASSIST IN THE REMISSIONS PROCESS

As this case demonstrates, indigent persons lack counsel during the remissions or collections process. Instead, indigent persons must appear pro se at payment review hearings before a trial court judge, even though the State is represented by a prosecutor and, often, a county collections officer. See App. 37-42, 137; RCW 10.73.150 (no provision for appointment of counsel); Mahone, 98 Wn. App. at 346-47 (holding no right to counsel in remissions process).

Indigent persons enjoy the assistance of counsel at sentencing and on appeal when courts impose LFOs. Yet, until Blazina was decided, many

public defenders did not object to the imposition of considerable LFOs. See State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) (declining to consider LFO claim on appeal because Blazina "did not object at his sentencing hearing to the finding or his current or likely future ability to pay these obligations"). Shirts's counsel did not object in any of his sentencing hearings to the large amount of LFOs imposed or to the accrual of interest. 1RP 12; 2RP 6, 8; 3RP 5; 4RP 1-9. Most trial courts were issuing judgments and sentences with boilerplate findings stating they had considered indigent defendants' ability to pay, without actually taking "account of the financial resources of the defendant and the nature of the burden that payment of costs will impose," as RCW 10.01.160(3) requires. See Blazina, 182 Wn.2d at 838 ("Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry."). The trial court here was no exception. See App. 11, 119, 201, 295. So, even though Shirts might have had counsel to represent him at sentencing, with respect to the LFOs, counsel did nothing to assist him.

In light of these substantial shortcomings and recent significant changes to the LFO landscape, counsel should be provided to assist indigent persons in the remissions process because currently it is unclear what must be shown to qualify for remission. An indigent defendant, unskilled in the

law, should not be forced to navigate this landscape alone. To ensure that LFOs are not retained despite the manifest hardship they impose on an indigent person, this important issue should be litigated, and a manifest hardship determination made, when counsel is presently appointed. This will allow for the most meaningful advocacy on the indigent person's behalf and the most accurate assessment of the ability to pay.

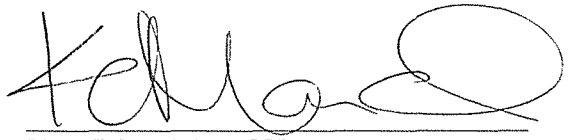
D. CONCLUSION

The trial court erred by refusing to consider whether an outstanding balance of more than $40,000 in LFOs caused Shirts a manifest hardship. Shirts asks this court to remand so that Shirts's motions for remission of LFOs may receive fair and just consideration.

DATED this 31st day of December, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorneys for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 47740-8-II
	)	NO. 47742-4-II (consolidated)
JASON SHIRTS,	)	NO. 47743-2-II (consolidated)
	)	NO. 47745-9-II (consolidated)
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF DECEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON SHIRTS
DOC NO. 839134
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF DECEMBER 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 31, 2015 - 2:03 PM

Transmittal Letter

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Court of Appeals Case Number: 47740-8

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